Supreme Court, U.S.
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No. 01-1840

In The

Supreme Court of the United States

DELTA FAMILY-CARE DISABILITY
AND SURVIVORSHIP PLAN,

Petitioner,

v.

FRANK REGULA,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

RESPONDENT'S BRIEF IN OPPOSITION

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I

STATEMENT OF THE CASE

This is an ERISA disability case. Prior to June 9, 1987, plaintiff Frank Regula was a participant in the Delta Family-Care Disability and Survivorship Plan (hereinafter referred to as "Delta Plan"). Thereafter, he became a beneficiary. On or about June 9, 1987, Frank Regula suffered severe injury, became disabled from his usual and customary occupation, and no longer became able to work in any occupation for pay or profit. Petitioner, Delta Plan, allowed the claim for long-term disability benefits, effective October 31, 1987. Record 12 at Administrative Record (A.R.) 1031.[1]

Petitioner certified and accepted Regula's disability, based on information from his treating physicians, and determined him eligible for continuation of disability benefits thirteen times between 1987 and 1995. A.R. 1037, 1041, 1042, 1085, 1086, 1106, 1109, 1123, 1144, 1148, 1155, 1163, and 1166. Under the terms of the plan, plaintiff became disabled on June 9, 1987, and remained so continuously thereafter. *Id.*

On July 25, 1995, Petitioner determined that Frank Regula would no longer receive benefits effective July 25, 1995. A.R. 1214. The Petitioner determined that Frank

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[1] References to the administrative records consisting of the claim file produced in this action are referred to as A.R. with the appropriate page designation and can be found at Record 12. Plaintiff separately filed the administrative record in this action at the district court. The parties have agreed that this previously submitted record constitutes the administrative record.

Regula could perform some type of unspecified work activity. *Id.* Petitioner never found any medical improvement in Regula's condition. Section 4.03 of the Delta Plan language states that "the Employee shall be eligible for Long Term disability benefits so long as he remains disabled in accordance with this subsection and Section 4.01." (*Petitioner's Appendix* at 100a-101a) (Hereinafter *Pet. App.*).

Frank Regula filed a complaint in the United Sates District Court Central District of California on October 17, 1996, to reinstate his benefit entitlement. Record 1. The District Court, the Honorable Ronald S.W. Lew, United States District Judge presiding, issued an order denying Regula's motion for summary judgment. Record 11 and 21. The court declined to enter judgment *sua sponte* for defendant. *Id.*

Based upon the content of the order of the district court, the parties filed a stipulation for the entry of judgment for defendant. Record 22. Regula preserved his right to appeal on the contentions set forth in his motion for summary judgment. *Id.* The court entered judgment approving the stipulation on March 25, 1998. Record 23.

On April 21, 1998, Frank Regula filed his notice of appeal from the judgment of the District Court. Record 24. The United States Court of Appeals for the Ninth Circuit reversed the decision of the district court. (*Pet. App.* at 1a-46a). The court of appeals held that the "treating physician rule" found in the body of common law surrounding the Social Security Act, and contained within the substantial evidence rule in every legal framework where the federal courts review the decisions of a professional fact finder (a non-jury), applies to disability determinations

under ERISA.[2] (*Pet. App.* 13a-24a). The court of appeals painstakingly set out the bases and rationale for application of the treating physician rule in the ERISA disability context. (*Pet. App.* 13a-24a).[3] The Ninth Circuit recognized the treating physician rule was well settled by the circuit courts of appeals long before the Social Security Administration subsequently codified it. (*Pet. App.* 19a, *citing Murray v. Heckler,* 722 F.2d 499, 501 (9th Cir. 1983)).

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[2] This Court and the Circuit Courts have uniformly utilized the treating physician rule in litigation brought before the federal judiciary. *See Olmstead v. L.C.*, 527 U.S. 581, 610 (1999) (recognizing, within the context of the Americans with Disability Act (ADA), that the opinion of a responsible treating physician ought to be given the greatest of deference); and *Viteck v. Finch*, 438 F.2d 1157, 1160 (4th Cir. 1971) (utilizing the rule in cases arising under the Social Security Act); and *National Mining Assn v. Dept. of Labor*, No. 01-5278 (D.C. Cir. June 14, 2002) (Loislaw.com, D.C. Circuit Court of Appeals Reports) (utilizing the treating physician rule in cases arising under a claim for benefits under the Black Lung Act); and *Harris v. Railroad Retirement Bd.*, 948 F.2d 123, 126 (2nd Cir. 1991) (utilizing the treating physician rule to cases arising under the Railroad Retirement Act); and *Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 273 fn. 13 (D.C. Cir. 1981) (utilizing the treating physician rule in the federal workers compensation setting); and *Curtis v. Shivers*, 674 F.Supp. 1237, 1240 (E.D. La. 1987) (utilizing the treating physician rule in cases arising under the Federal Tort Claims Act). *Cf. White v. Principi*, 243 F.3d 1378, 1380-1381 (Fed. Cir. 2001) (declining to utilize the treating physician rule within veterans' benefits cases, where Congress and the Veterans Administration specifically prescribed a statutory and regulatory framework for the consideration of evidence and where the treating physician would be employed by the fact-finding agency thereby putting the claimant at a disadvantage).

[3] The Ninth Circuit explained that the deference, as found by the federal courts, given to the treating opinion under the rule is not absolute and subject to rejection based on the articulation of sufficient reasons supported by substantial evidence within the record. *(See Pet. App.* at 16a-17a).

In applying the treating physician rule, the court of appeals recognized that in enacting ERISA, Congress created an elaborate framework of laws and regulations governing covered benefit plans in order to protect the rights of participants and their beneficiaries. (*Pet. App.* 22a *citing* 29 U.S.C. § 1001(b) (2000)); *see also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (ERISA was enacted to promote the interests of employees and their beneficiaries and to protect contractually defined benefits).

The court of appeals further noted that this Court's ruling in *Firestone v. Bruch, supra*, intended to reconcile the joint objectives of the statute while simultaneously interpreting the provisions of ERISA in order to maintain their consistency with other settled principles of law. (*Pet. App.* 20a *citing Firestone v. Bruch*, 489 U.S. at 112). Mindful of the Supreme Court's compromise in *Firestone*, in interpreting the provisions and joint objectives of ERISA, the court of appeals confronted its similar problem in the present case and resolved the issue in accord with the Supreme Court's analysis in *Firestone*. (*Pet. App.* 17a-24a).

The Ninth Circuit further found that frank violation of the treating physician rule reflects a sufficient pervasive conflict of interest as to permit the court to deprive the defendant of a grant of discretion found in the plan documents as a matter of a remedy, remanding to the district court for further proceedings on that point. (*Pet. App.* 24a-31a). The court of appeals found an unsettling pattern of inconsistency and insufficiency in the plan administrator's reasons for terminating Frank Regula's benefits. (*Pet. App.* 28a-31a). The court of appeals held that deviation from the treating physician rule constitutes

material, probative evidence of a conflict. (*Pet. App.* 30a). Therefore, the court of appeals remanded to the district court to resolve Delta Plan's apparent conflict of interest and to apply the treating physician rule. (*Pet. App.* 31a).

II

SUMMARY OF THE ARGUMENT AND REASONS FOR DENYING THE WRIT

Petitioner presents two questions. The first is whether the "treating physician rule" found in the body of law surrounding Social Security cases decided by the circuit courts, and contained within the substantial evidence rule in every legal framework where the federal courts review the decisions of a professional fact finder (a non-jury), applies to disability determinations under ERISA. (*Petition for Writ of Certiorari* at *i*) (Hereinafter *Pet.*). Petitioner argues that the Ninth Circuit's opinion conflicts with the other circuit courts of appeals, conflicts with the deference accorded to benefit plan administrators under *Firestone v. Bruch, supra*, and disrupts the primary goal of ERISA, which Petitioner contends is the uniform administration of benefit plans. (*Pet.* at i and 12-14).

As read by the Petitioner, the Ninth Circuit's holding conflicts with the Fourth, Fifth, Sixth, Eighth, and Eleventh Circuit Courts of Appeals. (*Pet.* at 12-14). Petitioner attempts to conflate a conflict where none exists. The Ninth Circuit's opinion is consistent with decisions from the other circuit courts of appeals regarding the treating physician rule's applicability to ERISA. Even giving Petitioner's argument the liberalist of readings, as the Ninth Circuit noted, any apparition that is perceived as conflict amongst the circuit courts of appeals, is readably

distinguished as superficial on the unique facts addressed in each cited case.

The Ninth Circuit's decision stands congruent with this Court's decision in *Firestone v. Bruch, supra,* and this Court's most recent interpretation of *Firestone*. *See Rush Prudential HMO, Inc. v. Moran*, No. 00-1021 (U.S. 2002), 2002 DJDAR 6898, 6905 and 6905 fn. 15 (June 21, 2002). The Ninth Circuit scrupulously applied the same analysis, as this Court did in *Firestone*, in deciding this matter, recognizing that Congress empowered the courts to develop, in the light of reason and experience, a body of federal common law governing employee benefit plans. *See Menhorn v. Firestone Tire Rubber Co.*, 738 F.2d 1496, 1499 (9th Cir. 1984); *see also Rush Prudential HMO, Inc. v. Moran*, 2002 DJDAR at 6904 *citing Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987). Contrary to Petitioner's claim, the adoption of the treating physician rule provides for commonsense uniformity in the treatment of medical opinions and is consistent with the true primary goal of ERISA, which is to protect employee benefits.

The second issue asks how much discretion the plan's final decision should receive where the plan fiduciary operates under a conflict of interest, i.e., it is both responsible for the funding and administration of the plan. (*Pet.* at i and 23-26). Petitioner argues that the Ninth Circuit held that a *per se* conflict exists, even if the plan irrevocably sets aside funds. (*Pet.* at 15). Petitioner misrepresents the Ninth Circuit holding on conflict of interest as *per se*. It does not. As the Ninth Circuit recognized, a plan that establishes a trust, whether irrevocable or revocable, does not create a true trust where the employer both funds and administers the plan. (*Pet. App.* at 26a). Therefore, the Ninth Circuit's holding that Petitioner operates under a

conflict of interest based on its dual role, is consistent with this Court's pronouncement that a plausibly raised conflict suffices to examine the deference afforded in reviewing a plan's decision. *Rush Prudential HMO, Inc. v. Moran*, 2002 DJDAR at 6905 fn. 15.

III

ARGUMENT

A

NO CONFLICT EXISTS AMONG THE CIRCUIT COURTS OF APPEALS

Petitioner asserts that the Ninth Circuit's decision facially conflicts with the decisions in six other circuit courts of appeals, and thus provides a basis for the court to grant its petition for a writ of certiorari with respect to the application of the treating physician rule to ERISA disability claims. (*Pet.* at 20-22). Petitioner misstates the law. The court of appeals painstakingly set out the bases and rationale for application of the treating physician rule in the ERISA disability context. (*Pet. App.* at 13a-24a). The application of the treating physician rule in the Ninth Circuit is consistent with the decisions of the other circuit courts of appeals.

The Second Circuit Court Of Appeals

The Second Circuit Court of Appeals issued a decision on November 19, 2001, recognizing the treating physician rule to cases arising under ERISA. *See Conners v. Connecticut Gen. Life Ins. Co.*, 272 F.3d 127 (2nd Cir. 2001). In *Conners*, the court of appeals found error in the district court's failure to recognize that the treating physician was

in fact a treating physician, and that if the district court had properly so recognized, it would have no doubt accorded that opinion greater weight. *Conners*, 272 F.3d at 135-136. The weight accorded a treating physician under the treating physician rule represents nothing more than a starting point for commonsense analysis of whether the plan's final decision is legally sufficient.

The court of appeals did not adopt the treating physician rule for purposes of the *de novo* standard of review. *Id.*, at 136 fn. 4. The court of appeals in *Conners* explained that the treating physician rule is designed to "encourage the development of the administrative record so that the district court can determine whether the administrator's decision was supported by substantial evidence." *Id.* Therefore, the treating physician rule serves no particular purpose in the context of *de novo* review by the district court. *Id.* By implication, under the Second Circuit's holding, the treating physician rule is implied where the abuse of discretion standard of review applies. In *Conners*, the Second Circuit remanded the matter because the district court violated the commonsense starting point of the treating physician rule under the *de novo* standard.[4] The Second Circuit is consistent with the Ninth Circuit.

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[4] Additionally, the Second Circuit in *Conners* also found as error the district court's failure to recognize that the termination of benefits was not due to *medical change of condition* but rather a change in plan policy. *Conners*, at 136. In the present case the Ninth Circuit also found as error the Delta Plan's sudden termination of benefits without an allegation of a change in Frank Regula's medical condition. (*Pet. App.* 29a-30a); *see also McOsker v. Paul Revere Life Ins. Co.*, 279 F.2d 586, 589 (8th Cir. 2002) (unless information available to an insurer alters in some significant way, the previous payment of benefits is a

(Continued on following page)

The Third Circuit Court Of Appeals

The Third Circuit Court of Appeals issued a decision in *Skretvedt v. E.I. Dupont De Nemours And Co.*, 268 F.3d 167 (3rd Cir. 2001) applying the treating physician rule, and citing the Ninth Circuit's decision in present matter. *Id.*, at 184. In *Skretvedt* the court of appeals analyzed an application for disability benefits under ERISA and the abuse of discretion standard. The court of appeals summarily concluded without fanfare that:

> We have long recognized that in the analogous area of disability benefits determinations under the Social Security Act, the "opinions of a claimant's treating physician[s] are entitled to substantial and at times even controlling weight." *Fargnoli v. Massanari*, 247 F.3d 34, 43 (3rd Cir. 2001); *see also Cotter v. Harris*, 642 F.2d 700, 704 (3rd Cir. 1981); *Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F.3d 1130 (9th Cir. 2001).

Id. Therefore, the Third Circuit agrees with the Ninth Circuit's decision in the present matter.

Petitioner relies on the Third Circuit decision in *Abnathya v. Hoffmann-La Roche, Inc.*, 2 F.3d 40, 43 (3rd Cir. 1993), for the proposition that the Third Circuit conflicts with the Ninth Circuit. (*Pet.* at 22). In *Abnathya*, the Third Circuit did not reject the treating physician rule; it utilized it. *Abnathya* rejected the conclusory note of the

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circumstance that must weigh against the propriety of an insurer's decision to discontinue those payments); and *Carugati v. The Long Term Disability Plan For Salaried Employees*, No. 01-C5863, 2002 WL 441479, *8 (N.D. Ill. March 21, 2002).

treating physician in favor of the more detailed opinion of the examining physicians. *Abnathya,* 2 F.3d at 43. That is precisely how the treating physician rule is applied in practice. *(See Pet. App.* at 16a-17a (explaining that the deference given to the treating opinion under the rule is not absolute and subject to rejection based on the articulation of sufficient reasons supported by substantial evidence within the record)). Therefore, the Third Circuit in *Abnathya* applied a corollary doctrine of the treating physician rule, that conclusory opinions are not entitled to deference. The court of appeals simply applied the name to the doctrine in *Skretvedt*. The Third Circuit's decisions do not, as Petitioner alleges, deepen the split among the circuit courts of appeals. (*Pet.* at 22). Rather, the Third Circuit has incrementally adopted the treating physician rule. *See Skretvedt*, 268 F.3d at 184.

The Fourth Circuit Court Of Appeals

Petitioner and the dissent in the court of appeals decision rely upon the Fourth Circuit's decision in *Elliott v. Sara Lee Corp.*, 190 F.3d 601, 608 (4th Cir. 1999), to find a conflict. (*Pet.* at 20-21 and *Pet. App.* 39a-40a (J. Brunetti, dissenting)). A fair reading of *Elliott* does not repudiate the treating physician rule. In *Elliott* the application of the treating physician rule to the facts of that case made no difference in light of the "persuasive contradictory evidence." *Id., citing Foster v. Heckler*, 780 F.2d 1125, 1130 (4th Cir. 1986) (finding that substantial contrary evidence existed to overcome any deference afforded a treating physician). The Fourth Circuit has clearly used the parameters of the treating physician rule to determine at least in the alternative that the rule's application had no

basis in fact to the case presented to it. *Elliott*, 190 F.3d at 608.

Elliott ignored the prior learned words in *Sheppard & Enoch Pratt Hospital, Inc. v. Travelers Insurance Company*, 32 F.3d 120, 126 (4th Cir. 1994). In the context of the doctor trying to obtain plan benefits, *Sheppard* declined to adopt the treating physician rule. *Sheppard & Enoch Pratt Hospital*, 32 F.3d at 126. In *Sheppard,* the treating physician had an obvious and material conflict, i.e., the payment of benefits directly to the doctors or medical care facility. *Id.* The court of appeals noted that the treating physician rule *is* appropriate when the application of that rule involves an assessment of whether the claimant is in fact disabled. *Id.* The Ninth Circuit dealt with the same issue finding that where evidence of "actual improprieties" exists, the fact finder is privileged to reject the opinions of the treating physician without further ado. *Saelee v. Chater*, 94 F.3d 520, 523 (9th Cir. 1996).

As the Ninth Circuit recognized in the present matter, the facts of *Sheppard* and the application of the treating physician rule are distinguishable when the issue is whether that rule applies in disputes over prescribed treatment, i.e., disputes over the payment of health care benefits directly to a physician rather then the receipt of disability benefits by the claimant. (*Pet. App.* 22a). The Ninth Circuit and the Fourth Circuit are complimentary. At most, there is an intra-circuit tension in the Fourth Circuit about the application of the treating physician rule to ERISA disability matters, between *Sheppard's* dictum and *Elliott's* observation that the rule would not change the outcome in that case.

The Fifth Circuit Court of Appeals

The dissent in the court of appeals and Petitioner rely upon the Fifth Circuit's decisions in *Dowden v. Blue Cross & Blue Shield of Texas, Inc.*, 126 F.3d 641, 644 (5th Cir. 1997) and *Salley v. E. I. DuPont de Nemours & Co.*, 966 F.2d 1011, 1016 (5th Cir. 1992) (*Pet. App.* 39a-40a (J. Brunetti, dissenting) and *Pet.* at 20-21). The court of appeals held that application of the treating physician rule to the distinct facts of the cases was not appropriate.

The court of appeals in both cases declined to adopt the treating physician rule in the context of the doctor trying to obtain plan benefits. *Dowden*, 126 F.3d at 644 and *Salley*, 966 F.2d at 1016. In *Dowden* and *Salley,* the treating physicians had an obvious and material conflict, i.e., the payment of benefits directly to the doctors or medical care facility. *Id.* The Fifth Circuit stated that where such a conflict exists, the treating physician rule does not apply. *Salley* at 1016. The Ninth Circuit dealt with the same issue, finding that where evidence of "actual improprieties" exists, the fact finder is privileged to reject the opinions of the treating physician. *Saelee v. Chater*, 94 F.3d at 523.

But as the Ninth Circuit recognized in the present matter, the facts of *Dowden* and *Salley* where the treating physician rule was not applied, are distinguishable from the present case in that those cases involved disputes over the payment of health care benefits directly to a physician rather than the receipt of disability benefits by the claimant. (*Pet. App.* 22a). No conflict exists between the Ninth and Fifth Circuits on this issue; i.e., whether the treating physician rule applies in disability cases.

The Eighth Circuit Court of Appeals

The *Regula* dissent recognized that *Donaho v. FMC Corp.*, 74 F.3d 894, 899 (8th Cir. 1996) supports the proposition that the treating physician rule applies in the disability context of ERISA matters. (*Pet. App.* at 39a-40a (J. Brunetti, dissenting)). Petitioner ignores the Eighth Circuit's holding in *Donaho*. Petitioner rests considerable weight on the Eighth Circuit's later opinion in *Delta Family-Care Disability and Survivorship Plan v. Marshall*, 258 F.3d 834 (8th Cir. 2001) (*Marshall*). *Marshall* raises two issues.

The first is whether *Marshall* could overturn *Donaho*. It cannot. *United States v. Franklin*, 250 F.3d 653, 665 (8th Cir. 2001) ("it is well established, however, that one panel of this court may not overrule another and so we must decline appellant's invitation to reconsider our prior decision").

The second question arising in *Marshall* is whether the Eighth Circuit expanded or constricted the incorporation of Social Security concepts into the ERISA disability paradigm. Careful analysis reveals that the Eighth Circuit expanded its incorporation of Social Security concepts. *Marshall*, 258 F.3d at 843 states:

> As we recently observed, however, a treating physician's opinion does "not automatically control, since the record must be evaluated as a whole." *Fletcher-Merrit* [*v. NorAm Energy Corp.*, 250 F.3d 1174, 1180 n. 3 (8th Cir. 2001)] (*citing Bentley v. Shalala*, 52 F.3d 784, 786 (8th Cir. 1995)).

The Eighth Circuit clearly adopted the treating physician rule in *Donaho*, 74 F.3d at 899. It is clear upon careful

reading of *Marshall* that the Eighth Circuit did not retreat from the pronouncement of the treating physician rule in *Donaho*, but instead continued to import the applicable tools from the Social Security decisional paradigm by citing *Bentley v. Shalala, supra*.

The holding in *Marshall* is consistent with the treating physician rule in its full regalia as understood and applied in the circuits. *See, e.g., Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998) (rejecting the isolation of a quantum of evidence approach). The proposition is patent on the face of *Marshall* in any event; the court of appeals cited a Social Security case for the proposition that the treating physician rule is tempered by the need to review the record as a whole. *Marshall*, 258 F.3d 843 *citing Bentley v. Shalala*, 52 F.3d at 786. The Eighth Circuit has properly expanded its reliance on Social Security cases to develop the common law of ERISA.

The Eighth Circuit continues in its adoption and refinement of the treating physician rule in *Coker v. Metropolitan Life Ins. Co.*, 281 F.3d 793, 799 (8th Cir. 2002) (*citing* and *applying Donaho*, giving deference to treating physician, but finding that plan administrators properly rejected the treating opinions); *see also Conley v. Pitney Bowes*, 176 F.3d 1044, 1049 (8th Cir. 1999) (applying and finding that the rule is not that a treating physician opinion trumps all other evidence, but that a court must give it appropriate weight); and *Dodson v. Woodmen of the World Life Ins. Soc.*, 109 F.3d 436, 438 (8th Cir. 1997) (same).

There exists no conflict between the Eighth Circuit's decision in *Donaho* and the Ninth Circuit's decision in the present matter. The final informed analysis illustrates

that the Eighth Circuit continues to incorporate relevant concepts from the common law surrounding the Social Security Act's disability provisions into its ERISA jurisprudence.

The Eleventh Circuit Court Of Appeals

The Petitioner and the dissent rely upon the Eleventh Circuit's decision in *Jett v. Blue Cross and Blue Shield of Alabama*, 890 F.2d 1137, 1139 (11th Cir. 1989) (*Jett*), as evidence of conflict. (*Pet.* at 20-21 and *Pet. App.* at 39a (J. Brunetti, dissenting)). As the Ninth Circuit stated in its opinion, *Jett* involved medical eligibility for payment claim. (*Pet. App.* at 22a). *Jett* declined to adopt the treating physician rule in the context of a doctor trying to obtain plan benefits. *Jett*, 890 at 1138. As in *Salley* and *Dowden*, *Jett* holds the treating physician had an obvious and material conflict. *Id.* The Eleventh Circuit stated that where such a conflict exists, the treating physician rule does not apply. *Jett.* at 1138. The Ninth Circuit has dealt with the same issue finding that, where evidence of "actual improprieties" exists in the rubric of the treating physician rule, the fact finder is privileged to reject the opinions of the treating physician without further ado. *Saelee v. Chater*, 94 F.3d at 523. *Jett* does not represent the last word on the matter.

Levinson v. Reliance Standard Life Ins. Co., 245 F.3d 1321 (11th Cir. 2001) (*Levinson)* answers the question within the jurisdictional boundaries of the Eleventh Circuit where no evidence of impropriety exists. The court of appeals noted that the district court had given less weight to the opinion of a reviewing physician and more weight to the treating physician relying upon *Donaho.*

Levinson, 245 F.3d at 1329. The court of appeals affirmed the decision of the district court, including its reliance on *Donaho* in giving greater weight to the opinions of a treating physician than to that of an examining physician. *Levinson*, 245 F.3d at 1332. Judge Cox in partial dissent differed only in his view of the remedy, stating that he would remand for further consideration by the carrier of an unaddressed issue. *Levinson*, 245 F.3d at 1332-1333 (J. Cox, concurring in part and dissenting in part). Therefore, the entire panel agreed with the weight of the evidence assigned by the district court and its reliance upon *Donaho*. The Eleventh Circuit has thus affirmed the application of the treating physician rule in ERISA *disability benefit* cases in *Levinson*, which is distinguishable from its decision in *Jett*, dealing with the issue of the treating physician rule within the context of *health care benefits*.

Petitioner ignores the opinion in *Levinson*, failing to cite or discuss it in its petition. Rather, Petitioner relies on the recent Eleventh Circuit decision in *Turner v. Delta Family-Care Disability and Survivorship Plan*, No. 01-15450, 2002 WL 1040194 at *3-4 (11th Cir. May 24, 2002). (*Pet. App.* at 116a). The *Turner* decision is not binding precedent. *See Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (a later panel may not overrule an earlier panel decision, following the old Fifth Circuit rule).

The Eleventh Circuit in *Levinson* issued a panel decision, distinguishable on its face from *Jett*, affirming the use of the treating physician rule within the ERISA

context where the treating physician does not have an economic interest. That opinion is binding on the Eleventh Circuit.[5]

There exists no tension between the Eleventh Circuit's decision in *Jett* and the Ninth Circuit's decision in the present matter. At most, there is an intra-circuit tension in the Eleventh Circuit about the application of the treating physician rule to ERISA disability benefit matters, between the panel decisions in *Levinson* and *Turner*.

Summation

The Ninth Circuit Court of Appeals' decision in the present matter stands consistent with her sister circuit courts. The opinions of the circuit courts that have decided the issue of whether the treating physician rule applies to cases arising under ERISA in determining a claimant's eligibility for *disability benefits* have found that it does. The cases deciding whether under a claim for *health care benefits* the rule applies are also consistent throughout the

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[5] The Eleventh Circuit has commented further on the holding in *Bonner*, finding where an intra-circuit conflict of law exists, the earliest panel opinion is controlling. *See Leonard v. Enterprise Rent A Car*, 279 F.3d 967, 973 (11th Cir. 2002); *see also United States v. Dailey*, 24 F.3d 1323, 1327 (11th Cir. 1994). "The law of this circuit is 'emphatic' that only the Supreme Court or Eleventh Circuit Court of Appeals, sitting en banc, can judicially overrule a prior panel decision." *Cargill v. Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997), *cert. denied*, 523 U.S. 1080 (1998) *quoting United States v. Woodard*, 938 F.2d 1255, 1258 (11th Cir. 1991), *cert. denied*, 502 U.S. 1109 (1992); *see also Davis v. Estelle*, 529 F.2d 437, 441 (5th Cir. 1976) (one panel of this Court cannot disregard the precedent set by a prior panel, even though it conceives error in the precedent. Absent an overriding Supreme Court decision or a change in the statutory law, only the Court en banc can do this).

circuit courts. Universally, the circuits have held that where an actual impropriety exists the rule does not apply. Based on this distinction, no conflict exists among the decisions of the circuit courts of appeals. Petitioner has raised the mere apparition of a conflict that, upon close examination, is nothing more than miniscule intra-circuit tension fleshing out the body of the common law concepts.

B

PETITIONER'S CONTENTION THAT THE "TREATING PHYSICIAN RULE" IS INAPPLICABLE TO ERISA IS WITHOUT MERIT

Justice Kennedy said it best:

> The opinion of a responsible treating physician in determining the appropriate conditions for treatment ought to be given the greatest of deference.

Olmstead v. L.C., 527 U.S. 581, 610 (1999) (Kennedy, J., concurring in the judgment) (under the Americans with Disability Act).

Petitioner asserts that the Ninth Circuit's decision "borrows" a Social Security Act regulation that Congress did not intend to adopt for ERISA. (*Pet.* at 15-22). Petitioner is wrong.

The Ninth Circuit's unveiling of the treating physician rule is applicable to disability determinations arising under ERISA, is consistent with the Congressional mandate that the federal judiciary is charged with the development of a body of federal common law governing employee benefit plans. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 *citing* 120 Cong. Rec. 29942 (1974) (remarks of

Sen. Javits) ([i]t is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans); *see also Menhorn v. Firestone Tire Rubber Co.*, 738 F.2d 1496, 1499 (9th Cir. 1984). The Ninth Circuit's recognition that the "treating physician rule" may be utilized within the context of actions brought under ERISA is nothing more then the recognition, consistent with that of Justice Kennedy's, that treating physicians are entitled to deference. That deference is given to treating physicians because they are the ones who know the patient best and have had the greatest opportunity to observe the patient.

The court of appeals did not "borrow" the "treating physician rule." As recognized by the Ninth Circuit:

> It has long been settled among the circuit courts that disability determinations under SSA will be guided by the treating physician rule. *See Murray v. Heckler*, 722 F.2d 499, 501 (9th Cir. 1983) (joining the Second, Fifth, and Sixth Circuits in holding that the treating physician's opinions should be accorded greater weight than that of an examining or reviewing physician). The Social Security Administration subsequently codified the treating physician rule in its regulations governing disability determinations. *See* 20 C.F.R. § 404.1527(d), 416.927(d) (2001).

(*Pet. App.* at 19a). Therefore, contrary to Petitioner's assertion, it is the Social Security Administration that acquiesced to the concept of the treating physician rule from the common law, a rule and concept utilized by federal courts with respect to suits arising under the ADA,

Black Lung Act, Railroad Benefits Act, and Federal Tort Claims Act.[6]

Contrary to the implication of Petitioner's argument, Congress' failure to adopt the treating physician rule was not an affirmative decision. (*Pet. App.* at 15). Any "failure" of Congress to adopt the "treating physician rule," or any other specific regulatory scheme, cannot be said to be, or not be, an affirmative indication of that legislative body's intent. As recognized by the Ninth Circuit, Congress' failure to include the "treating physician rule" as a statutory construct, is not conclusive of its views on the issue. (*Pet. App.* at 19a-21a *quoting Firestone v. Bruch*, 489 U.S. at 114-115).

Indicative of Congress' realization that the bare terms, however detailed, of ERISA's statutory provisions would not be sufficient to establish a comprehensive regulatory scheme, it empowered the federal courts to develop, in the light of reason and experience, a body of federal common law governing employee benefit plans. *See Pilot Life*, 481 U.S. at 56; *see also Menhorn v. Firestone Tire Rubber Co.*, 738 F.2d at 1499.

Petitioner argues that the treating physician rule is inapplicable to ERISA because it affects a statute that Congress created to provide uniform standards as evidenced by its provisions preempting laws that relate to ERISA. (*Pet.* at 15). Petitioner misplaces its reliance on this Court's decision in *Pilot Life* to support its position. *Id.* While it is true that Congress specifically crafted

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[6] *See* cases cited *supra* note 2.

ERISA to preempt *state* law in order to create a uniform standard, it did nothing to preempt the ability of the federal courts to develop the federal common law and interpret the purposes of the statute. *See supra,* Argument B, pp. 24-26; *see also Pet. App.* 21a.[7] This Court recognized long ago that Congress expected a body of federal substantive law be developed by the federal courts to deal with issues involving rights and obligations under private welfare and pension plans. *Pilot Life*, 481 U.S. at 56 *citing* 120 Cong. Rec. 29942. Therefore, the Ninth Circuit opinion follows the same analysis as recognized in *Pilot Life*, and applied in *Firestone v. Bruch*, in determining the issue in the present case. (*Pet. App.* at 20a-21a).

Petitioner criticizes the Ninth Circuit opinion as improperly diminishing the deference as described by *Firestone v. Bruch*. (*Pet.* at 16-17). Petitioner's contention ignores this Court's most recent interpretation of *Firestone v. Bruch,* and its grant of discretion in *Rush Prudential HMO, Inc. v. Moran,* 2002 DJDAR at 6905 and 6905 fn. 15. This Court held that standards for reviewing benefit determinations should be read to require a uniform judicial regime of categories of relief and standards of primary conduct, not a uniformly lenient regime of reviewing benefit determinations. *Id.* This Court further remarked that discretion is diminished where a conflict of interest exists or is plausibly raised. *Id.*, at fn.15. The Ninth Circuit's prophetic analysis in its decision regarding the amount of discretion afforded a conflicted plan is

[7] No case has ever held that ERISA preempts federal law, displaces federal law where applicable, or otherwise frees an ERISA plan from intelligent development of a common law as fashioned by the courts.

consistent with this Court's decision in *Rush*. *Compare*, *Pet. App.* 20a-22a *with Rush Prudential HMO, Inc. v. Moran*, 2002 DJDAR at 6905 and 6905 fn. 15.

Petitioner also argues that the court of appeals' decision in this case draws an unreasonable distinction between health benefit cases and disability benefit cases with respect to the credibility of physicians. (*Pet.* 18). Petitioner argues that, under either system, a physician is under an incentive to commit fraud and issue an unsubstantiated opinion in favor of a claimant. *Id.* Petitioner relies on *Pegram v. Herdrich*, 530 U.S. 211, 218 (2000) for the proposition that, in a fee for service system, the incentive for the physician is on more care. *Id.*

Petitioner's reliance on *Pegram* and its citation of that decision to this court are incomplete. Justice Souter, in delivering the opinion for a unanimous court, discussed the difference between fee for service medical care and the care provided in Health Maintenance Organizations (HMO). *Pegram v. Herdrich*, 530 U.S. at 218. While this Court did recognize that under a fee for service arrangement the physician's incentive would be to provide more care, this court stated that the "check on this incentive is a physician's obligation to exercise reasonable medical skill and judgment in the patient's interest." *Id.* Therefore, this Court rejected the opportunity to characterize the medical profession as one whose members would risk their license by fraudulently filling out continuing disability reports required by the Delta Plan for a mere pittance of payments.

Petitioner's final position is that the Ninth Circuit's decision mandates that the Delta Plan follow and incorporate the paradigm of the Social Security Act in total. *Pet.* 18-20. This is only the mere dust of an argument. As demonstrated *supra*, the treating physician rule is not a creature of the Social Security Act. It is a judicially uncovered concept made applicable by discovery of the common law. Nothing in the decision of the court of appeals requires ERISA plans to adopt or follow the Social Security Act or regulations. The Ninth Circuit merely recognizes, as this Court did with respect to the ADA, and as the federal judiciary has with respect to cases under the Black Lung Act, Railroad Benefits Act, FTCA, and the Social Security Act, that treating physicians are entitled to deference because they are in the best position to offer a cinematic medical opinion in comparison to the snapshot that a one-time examiner may offer of an individual's condition.[8]

Petitioner ignores the fundamental underpinning of the treating physician rule as it was engrafted into the decision-making process by judicial unveiling in *Murray v. Heckler*, 722 F.2d 499, 501 (9th Cir. 1983). *Murray* joined three other circuits in recognizing the proper application of the treating physician rule before it became universally acknowledged and finally incorporated into the Social Security regulations and rulings. *Murray* acknowledged the treating physician rule, stating:

> We note also that the Fifth Circuit has joined the Second and Sixth Circuits in giving greater

[8] *See* cases cited *supra* note 2.

> weight to the opinions of treating physicians. *See Bowman v. Heckler*, 706 F.2d 564, 568 & n. 3 (5th Cir. 1983). In *Bowman*, as in this case, "[t]he ALJ did not attempt to resolve the conflict in the testimony of the two [doctors]. . . . " *See* 706 F.2d at 568. The Fifth Circuit gave greater weight to the testimony of the treating physician because of the purpose for which he or she was employed: "Our reliance on the opinion of the treating physician is based not only on the fact that he is employed to cure but also on his greater opportunity to observe and know the patient as an individual." *Id.* We agree.

Murray, supra.

The treating physician has a greater pool of knowledge because of the longitudinal history with the patient and gathered knowledge for the purpose of improving the patient's health. The examining physician called upon by a plan or insurance company does so briefly and for the sole purpose of fulfilling the request for an opinion. The examining physician has a smaller pool of knowledge and the purpose for his information gathering is impure *ab initio*. Those reasons constitute why the courts invoked the treating physician rule in Social Security cases and other paradigms,[9] and that is why it applies here, as a matter of commonsense starting point. The treating physician rule does not rest upon calling one set of physicians ethical and branding the other set as not. Rather, the treating physician rule rests on a foundation of knowledge and purpose for which the knowledge was gathered in the first place.

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[9] *See* cases cited *supra* note 2.

The Ninth Circuit's decision does not incorporate the Social Security Act into the ERISA context. The treating physician rule is not an absolute, requiring a plan to give a treating physician controlling authority; it is merely the common sense recognition, as articulated by Justice Kennedy in *Olmstead v. L.C.*, that a treating physician opinion is entitled to deference. *Olmstead v. L.C.*, 527 U.S. at 610. A treating physician is afforded deference because he has a greater opportunity to "know and observe the individual as a whole." (*Pet. App.* at 15a *quoting Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999)). As the court of appeals found, such deference is warranted under a statute, "the purpose of which is at least in part 'to promote the interests of employees and their beneficiaries.'" (*Pet. App.* at 17a *quoting Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983)). Therefore, the "treating physician rule" is properly found within ERISA.

C

NO CONFLICT EXISTS REGARDING THE "CONFLICT OF ISSUE" ISSUE

Petitioner argues that the court of appeals has gone beyond this Court's holding in *Firestone v. Bruch*, *supra*, in finding a *per se* conflict of interest where the same entity funds and administers the plan. (*Pet.* at 23-26). The Petitioner errs. The Ninth Circuit's decision is consistent with this Court's analysis in *Firestone* and its most recent interpretation of that case. *Compare*, *Pet. App.* 20a-22a and 24a-31a *with Rush Prudential HMO, Inc. v. Moran*, 2002 DJDAR at 6905 and 6905 fn. 15.

As the court of appeals recognized, a plan that establishes a trust, whether irrevocable or revocable, does not create a true trust where the plan both funds and administers the plan. (*Pet. App.* at 26a). Therefore, the Ninth Circuit's holding that Petitioner operates under a conflict of interest based on its dual role, is consistent with this court's pronouncement that a plausibly raised conflict suffices to examine the deference afforded in reviewing a plan's decision. *Rush Prudential HMO, Inc. v. Moran, supra.* The court of appeals also found that where the plan has failed to rebut a properly raised conflict, demonstrating that its decision to deny or terminate benefits was not infected by the conflict it is operating under, the court reviews *de novo* the decision of the plan administrator. (*Pet. App.* at 27a *citing Termain v. Bell Industries, Inc.*, 196 F.3d 970, 976 (9th Cir. 1999)). This holding is not a new standard. *See Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1322 (9th Cir. 1995). It is also consistent with the other circuit courts of appeals. *Id.*, (discussing the approach other circuits utilize when confronted with a plan operating under a conflict of interest that has infected the plan determination). It is also consistent with this Court's own observation in its recent decision in *Rush Prudential HMO v. Moran, supra. See Rush*, 2002 DJDAR at 6905 fn. 15 ("it is a fair question just how deferential the review can be when the judicial eye is peeled for conflict of interest").

No conflict exists amongst the circuits on this issue. When the plan operates under a plausible conflict of interest, courts review that decision of the plan with a wary eye. *Id.* Clearly, the Ninth Circuit's holding merely anticipated the observations of this Court in *Rush*.

IV

CONCLUSION

There exists no conflict between the Ninth Circuit's decision and the other circuit courts. The Ninth Circuit's application of the treating physician rule is consistent with this Court's and the Circuit Courts' utilization of that rule throughout the body of federal law and effectuates the purpose of ERISA, to protect the rights of participants and beneficiaries. Further, the Ninth Circuit's opinion is consistent with the Congressional mandate that the federal judiciary is charged with the development of a body of federal common law. For all the forgoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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